Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-583

In the Supreme Court of the United States

OCTOBER TERM, 1980

WHEELING-PITTSBURGH STEEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JERROLD WOHLGEMUTH
Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-583

WHEELING-PITTSBURGH STEEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner violated Section 8 (a) (1) of the National Labor Relations Act by suspending two employees for asserting their right under a collective bargaining agreement to refuse to operate a defective crane that they reasonably and in good faith believed to be dangerous to themselves and to their fellow employees.

2. Whether the Board's remedial order was proper.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	1
Statement	1
Argument	8
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Kohls v. *NLRB*, 629 F.2d 173	9
NLRB v. *C&C Plywood Corp.*, 385 U.S. 421	8
NLRB v. *Remington Rand, Inc.*, 94 F.2d 862	10
NLRB v. *Strong*, 393 U.S. 357	8
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177	11
Universal Camera Corp. v. *NLRB*, 340 U.S. 474	10

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*	1
Section 7, 29 U.S.C. 157	5, 8, 9
Section 8(a)(1), 29 U.S.C. 158(a)(1)	6, 8
Section 8(a)(3), 29 U.S.C. 158(a)(3)	6
Labor-Management Relations Act of 1947, Section 502, 29 U.S.C. 143	10

PREVIOUS PAGE WAS BLANK

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-59a) is reported at 618 F.2d 1009. The decision and order of the National Labor Relations Board (Pet. App. 1a-37a) are reported at 241 N.L.R.B. No. 198.

JURISDICTION

The judgment of the court of appeals (Pet. App. 60a-62a) was entered on May 21, 1980, and a timely petition for rehearing was denied on July 2, 1980. The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 8.

STATEMENT

1. Edmond Semancik operates an electric overhead crane at petitioner's Allenport, Pennsylvania steel plant.[1] Semancik had operated the crane for three years, and prior to the incident herein, had

---

[1] The crane is used to load and unload steel pipe from railroad cars and to move steel pipe weighing as much as 7½ tons throughout the building. The crane is attached to a bridge that is equipped with wheels to permit it to move along two parallel rails, approximately 115′ apart and 30′ above the floor. The steel pipe is carried over the heads of approximately 35 employees who work on the production floor (Pet. App. 6a).

never refused to perform his job for safety or other reasons (Pet. App. 6a; R. 68a).[2]

On the morning of September 19, 1977, Semancik observed that the crane's wheels were bumping as they rolled on the rails, causing the load of pipes to swing on the cable as the crane moved. Semancik stopped the crane to investigate and discovered that there was a hole, or spall, in the tread of one of the wheels[3] (Pet. App. 7a; R. 76a-78a). Semancik believed that the hole caused the bumping when it came into contact with the rail, and that the bumping could cause the loads of pipe to sway and fall from the hoist cables, resulting in injury to himself or the employees on the production floor (Pet. App. 7a; R. 95a-96a, 77a). Semancik notified his shift foreman of the problem and asked that the wheel be changed (Pet. App. 7a; R. 78a, 95a-96a). The crane repairman agreed to change the wheel, but later told Semancik that shop foreman Michaels had ordered that the wheel not be changed and that Semancik operate the crane as it was (Pet. App. 8a; R. 79a-80a, 423a-424a). Semancik and the two hookers[4] working with him on the production floor that morning then went to explain the situation to Michaels, who chastised Semancik for holding up production and ordered Semancik to operate the crane or go

---

[2] "R." refers to the Joint Appendix filed in the court of appeals.

[3] Semancik had never seen a hole in a crane wheel. Semancik did not know that this wheel had been removed from the crane in June 1977, when management discovered the hole, but reinstalled on July 31, 1977, when the axle of the replacement wheel broke (Pet. App. 7a, 14a; R. 78a).

[4] "Hookers" attach the loads of pipe onto the crane's hoisting cables (Pet. App. 6a n.6).

home (Pet. App. 8a-9a; R. 80a-82a, 369a-370a). At that point, Semancik declared that he was invoking his right, under Section 14(C) of the collective bargaining agreement, not to work on an unsafe job (Pet. App. 9a; R. 82a, 330a, 423a).[5]

Semancik returned to the crane with the crane repairman and the repair foreman, and operated the crane while they observed the wheel (Pet. App. 10a; R. 83a, 330a). The repair foreman told Semancik that he believed that the wheel was safe, but that the rails appeared slippery and needed to be sanded (Pet. App. 10a-11a; R. 331a-332a). Thereafter, the rails were sanded and the wheels were realigned, but the wheel was not changed (Pet. App. 12a). The repair foreman reported that he believed the crane was safe for operation, and the shift foreman ordered Semancik back to work. When Semancik again invoked his contractual right not to work on the unsafe crane, he was suspended (Pet. App. 11a; R. 84a, 207a-208a, 332a-333a). Semancik immediately called

---

[5] In pertinent part, the contract provides that employees "who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question" have the right to "[r]elief from the job or jobs, without loss to their right to return to such job or jobs, and, at Management's discretion, assignment to such other employment as may be available in the plant; provided, however, that no employee, other than communicating the facts relating to the safety of the job, shall take any steps to prevent another employee from working on the job, provided he first reports the matter to his committeeman or foreman. Should either the Management or the Arbitrator conclude that an unsafe condition within the meaning of this Section existed and should the Employee not have been assigned to other available, equal or higher-rated work, he shall be paid for the earnings he otherwise would have received" (Pet. App. 4a-5a).

his union president to inform him about the problem and to request that he come to the plant (Pet. App. 11a; R. 84a, 125a-126a). Thereafter, Semancik explained to the general foreman that his refusal to operate the crane was based on Section 14(C) of the contract. The general foreman reiterated that Semancik was suspended, and ordered a replacement crane operator (Pet. App. 11a, 15a; R. 84a, 154a-157a).

The union president arrived and advised Semancik of his right to tell the replacement about the unsafe condition. Semancik explained the problem to the replacement, and, after inspecting the wheel, the replacement decided that he too would assert his contract right not to operate the crane (Pet. App. 15a n.21; R. 84a-85a, 127a-128a, 155a).[6] A second replacement, Francis Roberts, was summoned. After listening to Semancik's explanation, Roberts agreed that the crane would be unsafe and dangerous to the hookers as they loaded pipes onto railroad cars, and invoked his contract right not to operate the crane. Roberts was then suspended (Pet. App. 15a-16a; R. 87a, 106, 115a-120a, 391a). Finally, a third replacement arrived and was informed by the union grievance committeeman about the hole in the wheel as well as the suspensions of Semancik and Roberts. After being assured by management that the crane was safe, this replacement decided to operate the crane, but only at a slow speed (Pet. App. 18a; R. 392a-394a, 405a-406a).[7]

---

[6] This replacement was not suspended because he was a new employee and was not qualified to operate the crane (Pet. App. 15a n.21).

[7] In the meantime, the union president left the plant to file a safety complaint with OSHA (Pet. App. 22a; R. 134a-135a).

At a subsequent disciplinary hearing, Semancik and Roberts were given additional 30-day suspensions on the grounds that no hazardous condition existed and that the employees had been unreasonable in refusing to accept management's assessment that the crane was safe to operate (Pet. App. 20a-21a).

2. The Board, adopting the decision of the Administrative Law Judge, found that Semancik and Roberts were engaged in activity protected by Section 7 of the Act, 29 U.S.C. 157, when they invoked Section 14(C) of the collective bargaining agreement and refused to operate the crane. In so holding, the Board rejected petitioner's contention that the crane operators had acted unreasonably in refusing to work because they had disagreed with management's opinion that the crane was safe to operate (Pet. App. 24a). The Board first found that the contract required only that the operators possess an honest belief that the working condition was unsafe (Pet. App. 24a-26a). Secondly, the Board concluded that, even if the contract required reasonable grounds to believe that the working condition was unsafe, Semancik and Roberts had shown such grounds (Pet. App. 27a; footnote omitted):

> Manifestly, continued use of the spalled wheel could lead to further deterioration and bumping and slipping, as [petitioner's] witnesses readily conceded. In view of Semancik's competence and long experience in the operation of the crane, I find that his fears for the safety of the crane and the consequences resulting from the crane's continued operation if the spalled wheel were not changed were not arbitrary or capricious but furnished a reasonable basis for his decision to assert his Section 14(C) contractual right to be relieved of his job he regarded to be unsafe. Indeed, confirming the reasonableness of Seman-

> cik's evaluation and belief respecting the dangerous condition of the spalled wheel is the fact that the [petitioner] itself had removed the wheel from the crane because of a spall about 3½ months before the September 19 events here involved only to reinstall it 7 weeks later when a replacement for the new wheel was needed and another spare wheel was not available, although, to be sure, Semancik was not aware of these wheel changes. Moreover, on October 9, the spalled wheel was again replaced with a new carbonized wheel. The fact that another craneman ultimately was willing to, and did operate the crane in place of Semancik does not retract [*sic*] from Semancik's sincerely-held and reasonable belief that the spalled wheel created a condition rendering the crane unsafe "beyond the normal hazard inherent" in its operation.

Accordingly, the Board found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by disciplining Roberts and Semancik (Pet. App. 28a-29a, 31a).[8] The Board ordered that the employees be made whole for any loss of earnings they may have suffered as a result of their suspension (Pet. App. 30a-31a, 33a).

3. The court of appeals upheld the Board's finding that the suspension of Semancik and Roberts violated Section 8(a)(1) of the Act (Pet. App. 39a). Initially,

---

[8] The Board also found that the suspensions were violative of Section 8(a)(3) of the Act (Pet. App. 31a) and that petitioner violated Section 8(a)(1) of the Act by making certain coercive statements to employees (Pet. App. 31a). The court of appeals dismissed both of these findings as not supported by substantial evidence (Pet. App. 55a-58a). No issue concerning those findings is raised here.

the court rejected petitioner's contention that the controversy should not be decided by the Board, but by arbitration. The court noted that the existence of an arbitrable issue does not eliminate the Board's jurisdiction to adjudicate unfair labor practices (Pet. App. 45a-46a). Moreover, the court found that the Board properly declined to defer to arbitration here because petitioner had never requested the Board to do so, as required by Board practice (Pet. App. 47a-48a).

The court rejected petitioner's contention that Semancik and Roberts were not engaged in concerted activity (Pet. App. 50a-51a; footnotes and citations omitted):

> The record reveals that this incident involved more than individual refusals by Semancik and Roberts. When Semancik invoked his rights under Section 14(C) of the collective bargaining agreement, he declared that the safety of the employees working on the floor below was endangered, as well as his own. When he went to discuss the condition of the wheel with Michaels, the electric shop foreman, two other employees working with the crane accompanied him. Roberts spoke to Semancik about the possible hazard before he decided to refuse to operate the crane. Thus, from the beginning there was some group action by fellow workers in the interest of employee safety. Further, the union was also involved. Semancik contacted his union representatives before he left the building on the morning of September 19, 1977. At his request, the union president and union grievance committeeman came to the site of the incident. The union represented Semancik and Roberts at their hearings on September 23. Additionally, the union president filed a complaint with the Occupational Safety

> and Health Administration concerning the potential danger the wheel created for all the employees. On this record it would be fair to say that Semancik and Roberts acted here as spokesmen for the safety of all the employees, and that the employees—as indicated by the union's actions—shared this safety concern.

The court also found that "there is substantial evidence to support the ALJ's findings that, in light of Semancik's experience and skill, the crane operators' refusal to work for safety reasons * * * had a reasonable basis in fact and did not constitute a breach of contract" (Pet. App. 54a; footnote omitted).

ARGUMENT

1. Petitioner contends that its action in suspending Semancik and Roberts was not an unfair labor practice because the refusal to operate the crane was not concerted activity protected by Section 7 of the Act[9]—and that this case therefore involves only a contract dispute over which the Board has no jurisdiction.[10] Petitioner argues (Pet. 24-29) that

---

[9] Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) implements that guarantee by making it illegal for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *."

[10] Petitioner apparently does not dispute (Pet. 15-17) the settled proposition that the Board has jurisdiction to construe collective bargaining agreements in order to adjudicate an unfair labor practice. *NLRB* v. *Strong*, 393 U.S. 357, 360-361 (1969); *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 428-429 (1967).

there was no concerted activity here because Semancik's and Robert's refusals to operate the crane were "isolated actions of individual employees" (Pet. 25) with no expression of "any concern for the safety of other employees; nor did they attempt to or express any desire to warn other employees of an alleged danger" (*ibid.*). This assertion merely challenges the contrary finding of the Board, which was sustained by the court of appeals. As the court found, "Semancik and Roberts acted here as spokesmen for the safety of all the employees" (Pet. App. 51a); their actions were "for mutual aid or protection" (*id.* at 52a).[11]

Petitioner also contends (Pet. 18-23) that the refusals to operate the crane violated the no-strike clause of the contract and were therefore outside the protection of Section 7. It claims the employees "had no basis for continuing to refuse to operate the crane after management corrected what it found to be the problem * * *" (Pet. 22). Again, however, petitioner merely quarrels with the Board's finding, upheld by the court of appeals, that the employees reasonably and in good faith believed that the crane

---

[11] *Kohls* v. *NLRB*, 629 F.2d 173 (D.C. Cir. 1980), relied on by petitioner (Pet. 26-29), is inapposite. There, the court found that the employee in question had acted alone, for his own benefit and without the assistance of the union; concerted activity could be found only in the circumstance that the employee sought to enforce the collective bargaining agreement. Here, the court of appeals expressly observed (Pet. App. 52a n.14) that, since there was "ample evidence in the record to support the finding that the refusals to operate the crane were not solitary acts by individual employees, we need not reach the issue of constructive concerted activity"—the issue in *Kohls*.

was unduly dangerous and properly invoked Section 14(C) of the agreement.[12]

Accordingly, the issue presented in this case is whether the Board's findings are supported by substantial evidence, an issue which does not warrant consideration by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[13]

2. Petitioner contends (Pet. 29-30), that Semancik and Roberts are not entitled to receive back pay for the period between September 19 and October 9, 1977, the date petitioner finally replaced the wheel, because until it was replaced they would not have been willing to operate the crane even if they had been asked. The Board concluded (Pet. App. 30a n.37), however, that, but for the petitioner's wrongful suspensions, they might have returned to work the next day; accordingly, the Board held that "it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those for which it was immune," citing *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir. 1938). This conclusion was not unreasonable, for, regardless of the statements the two may have made in defending their position at the hearing, it is impossible to know what their

---

[12] Section 502 of the Labor-Management Relations Act, of 1947, 29 U.S.C. 143, which provides, in pertinent part, that "the quitting of labor by an employee * * * in good faith because of abnormally dangerous conditions for work * * * [shall not] not deemed a strike," is not involved here. Since the employees properly invoked Section 14(C) of the agreement, no strike in breach of contract occurred (Pet. App. 28a n.35).

[13] As the court of appeals noted (Pet. App. 46a-48a), while the presence of contractual issues does not preclude the exercise of jurisdiction, the Board may choose to defer to the arbitration process. Petitioner never requested deferral (Pet. App. 47a-48a).

positions might have been had the Company granted them relief from the job rather than reacting to their request with hostility and unlawful discipline. Moreover, had they not been suspended, they might have been assigned to alternative work, as is contemplated by the contract in such situations. Petitioner failed to show that the men would not have returned to work had they not been suspended. The Board's backpay order is therefore well within the proper scope of its discretion, for it effectuated "a restoration of the situation, as nearly as possible, to that which would have obtained but for" petitioner's violation of the Act. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM A. LUBBERS
General Counsel

WADE H. MCCREE, JR.
Solicitor General

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JERROLD WOHLGEMUTH
Attorney
National Labor Relations Board

NOVEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333437 159